

No. 1492.

In the

United States Circuit Court of Appeals

For the Ninth Circuit.

SOUTHERN PACIFIC RAILROAD CO., et al., Defendants and Appellants
vs.
UNITED STATES OF AMERICA, Complainant and Appellee.

COMPLAINANT'S BRIEF.

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FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Explanation of Suit.

This is a suit in equity. The bill of complaint is cast in the same general form and involves points of law and facts practically the same in character as those involved in the case of the United States of America vs. Southern Pacific Railroad Company, et al., No. 1453 on appeal in this Court. The bill refers to the same statutes passed by Congress, under which grants were made to the Atlantic and Pacific Railroad Company and to the Southern Pacific Railroad Company to aid in the construction of railways. It sets out that the grant to the Atlantic and Pacific Railroad Company was made prior to what is known as the "Branch Line" grant to the Southern Pacific Railroad Company, that the lands in controversy lie partly within the place limits and partly within the indem-

nity limits of the grant made to the Atlantic and Pacific Railroad Company, and that the grant to this company has been regularly declared forfeited. It shows that, claiming under the indemnity provisions of the Act of 1871, the so-called "Branch Line" grant, the Southern Pacific Railroad Company, subsequent to the forfeiture referred to, procured patents to the lands described in the bill of complaint.

The suit is brought by the United States to vacate these patents issued by the United States to the defendant railroad company, for the tracts of land described, to quiet the title of the United States for such lands, and to determine what, if any, of said lands have been sold to bona fide purchasers, and in case of sales to bona fide purchasers of any of said lands that such title be confirmed to the purchasers, and that an accounting be had for the value of such lands at the rate of \$1.25 per acre, in accordance with the adjustment acts of Congress of March 3, 1887, and March 2, 1896.

The testimony was taken, mostly in the form of stipulations as to certain facts, but partly in the form of testimony before a special examiner.

The Bill of Complaint made the following parties defendants, the Southern Pacific Railroad Company and D. O. Mills and Homer S. King as Trustees, and the Central Trust Company of New York as Trustee.

By an amendment to the bill of complaint filed by consent of parties on November 2, 1905, the bill of complaint was amended by bringing in as a party defendant Jackson Alpheus Graves, whom the answer of the Southern Pacific Railroad Company alleged had purchased some of the lands described in the bill, and by stipulation of parties, filed November 22nd, 1905, it was agreed and stipulated "That the answer of the Southern Pacific Railroad Com-

pany and others, on file in this case, shall stand as the answer of the defendant Jackson Alpheus Graves, with the same effect as if his name had been specifically mentioned in said answer as a party answering the bill * * * that the replication of the United States to the answer shall stand to the answer of Jackson Alpheus Graves."

Statement of Facts.

It is stipulated between the parties as follows:

"SUBDIVISION V. (Trans. p. 92.)

Item 35. The North East quarter of North East quarter ($NE\frac{1}{4}$ of $NE\frac{1}{4}$) of Section Seven (7), in Township Six (6) North, Range Eight (8) West, San Bernardino Base and Meridian, is situated within primary limits of the land-grant made unto the Atlantic & Pacific Railroad Company by the hereinbefore mentioned Act of Congress of July 27th, 1866, and within indemnity limits of the land-grant made unto the Southern Pacific Railroad Company by the hereinbefore mentioned Act of Congress of March 3rd, 1871; but the said land is not within either primary or indemnity limits of the land-grant made unto the Southern Pacific Railroad Company by the said Act of Congress of July 27th, 1866.

Item 36. The West half ($W\frac{1}{2}$) of Section Thirty-one (31), in Township Nine (9) North, Range Fifteen (15) West, San Bernardino Base and Meridian, is situated within indemnity limits of the land-grant made unto the Atlantic & Pacific Railroad Company by the hereinbefore mentioned Act of Congress of July 27th, 1866, and within indemnity limits of the land-grant made unto the Southern Pacific Railroad Company by the hereinbefore mentioned Act of Congress of March 3rd, 1871; but the said land is not within either primary or indemnity limits of the land-grant made unto the Southern Pacific Railroad Company by the said Act of Congress of July 27th, 1866.

Item 37. The lands described in Item 35 and Item 36 of this Stipulation as to Evidence, were patented by the

United States unto the Southern Pacific Railroad Company by patent dated June 30th, 1903, pursuant to said Company's indemnity selection thereof as indemnity lands of its said March 3rd, 1871 land-grant, by List No. 93, in due form, filed in the Los Angeles land office on November 10th, 1902.

Item 38. It appears from the records of the United States Land Office, for the Los Angeles District of California, that within the indemnity limits of the grant made to the Southern Pacific Railroad Company by the Act of Congress of March 3rd, 1871, there remains more than 50,000 acres of surveyed public land, vacant of record, embraced in odd numbered sections returned as agricultural in character, which have not been selected as indemnity by said Company, not including any lands embraced within either the granted limits or indemnity limits of the grant to the Atlantic and Pacific Railroad Company, made by the Act of Congress of July 27th, 1866."

It is thus seen that all of the tracts of land described in the bill are situated within either the primary or indemnity limits of the grant made to the Atlantic and Pacific Railroad Company of July 27th, 1866, as established by the maps of definite location filed in 1872, and it is also seen that these lands are claimed by the Southern Pacific Railroad Company under its grant of March 3rd, 1871, and that none of these lands are within the limits of the grant to the Southern Pacific Railroad Company by section 18 of the Act of Congress of July 27th, 1866.

Argument.

It is alleged in the bill of complaint in substance, that it has been finally and conclusively adjudged and determined by the Supreme Court of the United States that the Southern Pacific Railroad Company did not acquire, and could not take, under its grant of March 3rd, 1871,

any of the lands falling within either the primary or indemnity limits of the grant to the Atlantic and Pacific Railroad Company.

The final records and decrees in former litigations are in evidence in this case, and are set forth in the Transcript, and we especially rely upon the record in case No. 184, reported in 168 U. S. at pages from 1 to 66. That case, as stated by the Court in the opinion, and as stated by this Court in numerous cases, was brought for lands situated precisely as these are, that is, within the indemnity limits and within the place limits of the Atlantic and Pacific grant, falling also within the place limits or indemnity limits of the Southern Pacific grant of 1871.

The Government also introduced in evidence the decision of the Supreme Court and the final decree in the second appeal in that case in which the decision of the Supreme Court is reported in 184 U. S. at page 49, and which related to the claim of Jackson Alpheus Graves as a bona fide purchaser of certain lands claimed by him under purchase from the Atlantic and Pacific Fibre Importing and Manufacturing Company, a corporation of Great Britain.

In that case Graves claimed to be a bona fide purchaser under a foreign corporation, under the same deed mentioned in the answer of defendant companies, and under which it is alleged Graves is a bona fide purchaser of some of the tracts of land described in the bill of complaint.

The Supreme Court adjudged in that case (184 U. S. 49) that the Atlantic and Pacific Fibre Company, which will be called the "Fibre Company" for short, being a foreign corporation, was not entitled to the benefits of the adjustment acts of 1887 and 1896, and further decided that Graves, not having paid any valuable consideration

for the lands, was not a bona fide purchaser under that contract or deed, being the same contract referred to in the pleadings in this case.

No testimony has been taken by the defendants showing that Graves is a bona fide purchaser from the railroad company of the lands sold to him by the Fibre Company, holding under the railroad, and it may be assumed that he does not claim to be a bona fide purchaser of these lands in view of the decision of the Supreme Court before mentioned.

If, however, any such claim should be made, it will be fully answered by the decision of the Supreme Court in the appeal in 184 U. S. 49.

The lands involved in the present case were unpatented lands when the contract of sale was made to the Fibre Company, and when the Fibre Company sold to Graves, for it is stipulated as above stated, thereafter, that these lands were patented as late as 1902.

It has been decided by this Court, and by the Supreme Court (200 U. S. 341, 354), that the Southern Pacific Railroad Company was liable in equity to the United States as for a conversion of personal property, for the value of the lands erroneously patented to the railroad and sold by it to bona fide purchasers, and that the adjustment Acts of Congress of 1887 and 1896 had no other effect than to limit the liability of the railroad to \$1.25 per acre, instead of the true value of the lands.

As none of the lands in this suit are in the hands of bona fide holders, the question here involved is as to the title, and as to the validity of the patents.

The former cases, and we would especially refer to the cases decided in 168 U. S. 1, and 200 U. S. 341, involved lands situated precisely as to the lands in the present suit. They were claimed by the Southern Pacific Railroad Com-

pany under its grant of 1871, part of them being claimed as indemnity lands, and part of them as place lands, and the railroad company had applied to select some of them, as it did in this case, and many of the lands had been erroneously patented, but in those cases, the Supreme Court, as well as the Circuit Court, vacated the patents so issued, holding that those lands were set apart for the Atlantic and Pacific Railroad Company, for another and totally distinct object of internal improvement, and that when that grant was forfeited, and the lands were retaken by the United States, they were not retaken for the benefit of the Southern Pacific, and that it could not take any of those lands.

United States vs. Southern Pacific R. R. Co., 146
U. S. 570, 619.

Southern Pacific R. R. Co. vs. United States, 168
U. S. 1,

and on the second appeal, 184 U. S. 49.

Southern Pacific R. R. Co. vs. United States, 200
U. S. 341,

affirming 117 Fed 544, and 133 Fed. 651.

As heretofore stated, the record in the case, 168 U. S. 1, is in evidence in the present case, and is also covered by the stipulation of parties. At pages 46 and 47 the Supreme Court, in referring to the lands involved, say:

“The lands here in dispute belong to one or the other of the following classes: Lands within the common granted limits of both the Atlantic and Pacific grant of 1866 and the Southern Pacific grant of 1871; lands within the granted limits of the Southern Pacific grant and the indemnity limits of the Atlantic and Pacific grant; lands within the Southern Pacific indemnity limits and the Atlantic and Pacific granted limits; lands within the common indemnity limits of both grants.”

The effect of the former decisions as precluding the Southern Pacific from asserting a right to these lands is reviewed in the following cases and the rule laid down that what has once been determined by a Court of competent jurisdiction under the issues of a suit cannot be again opened in the same Court or in any other Court by the parties or their privies.

Southern Pacific R. R. Co., vs. United States, 168 U. S. 1;

United States vs. California and Oregon Land Company, 192 U. S. 355.

Upon the points presented in the brief of the appellant, in addition to what we have hereinbefore set forth, we ask the Court's careful consideration of the argument presented in the brief of the cross appellant (complainant herein) in the case No. 1453 hereinbefore referred to.

It is respectfully submitted that there is no merit in the contention made by the appellant that the defendant railroad company is entitled to select lands within the limits of the forfeited Atlantic and Pacific Railroad Company grant merely because such lands were public lands at the time of the selection. The precise point has been determined against appellant's contention. The forfeiture Act was for the benefit of the complainant and not for the benefit of the Southern Pacific Railroad Company.

Respectfully submitted,

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